TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~373.~~ 169

THE REPUBLIC FIRE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES AND JOSEPH R. WEIDE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED DECEMBER 10, 1870.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the circuit of the United States in and for the district of Minnesota, greeting:

Because in the record and proceedings, and also in the rendition of the judgment in a suit before you or some of you, between Charles Weide and Joseph R. Weide, plaintiffs, and The Republic Fire Insurance Company, defendant, in a plea which is in the said circuit court, a manifest error hath happened to the great damage of the said The Republic Fire Insurance Company, defendant, as it says; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at Washington, on the fifth day, the first Monday, in
2 December next, in the said Supreme Court, to be then and there held, that the records and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at St. Paul, in said district of Minnesota, this 11 day of July, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the ninety-fifth year.

[SEAL.] H. E. MANN,
Clerk of the Circuit Court of the United States, for the District of Minnesota.

LAMPREYS, MORRIS LAMPREY,
Attorneys for Pl'ff in Error.

3 The answer of the judges of the circuit court of the United States for the district of Minnesota in the within writ mentioned:

The record and proceedings whereof mention is within made with all things concerning the same, are hereby respectfully certified to the Judges of the Supreme Court of the United States within mentioned in a certain schedule to this writ annexed as within it is commanded.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at St. Paul, in the district of Minnesota, this eleventh day of November, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the ninety-fifth.

[SEAL.] H. E. MANN,
Clerk U. S. Circuit Court, District of Minnesota.

(Indorsed: United States circuit court, dist. of Minnesota. Republic Fire Ins. Co., pl'ff in error, vs. Cha's Weide et al., def'ts in error. Writ of error. Filed July 11, 1870. H. E. Mann, clerk.

4 UNITED STATES OF AMERICA, *ss:*

To CHARLES WEIDE and JOSEPH R. WEIDE, greeting:

You are hereby cited and admonished to be and appear at the Su-

preme Court of the United States to be holden at Washington, in the District of Columbia, on the first Monday in December next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the eighth circuit and district of Minnesota, wherein The Republic Fire Insurance Company is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States this 11 day of July, in the year of our Lord one thousand eight hundred and seventy.

[SEAL.] R. R. NELSON,
Judge of the Circuit Court of the United States, for the Eighth Circuit and District of Minnesota.

MORRIS LAMPREY, LAMPREYS,
Att'ys for Pl'ff in Error.

5 (Indorsed:) United States circuit court, district of Minnesota. Cha's Weide et al. vs. Republic Fire Ins. Co. Citation.

Service of the within citation by copy is admitted at Saint Paul, Minnesota, this July 11th, A. D. 1870.

ALLIS, GILFILLAN & WILLIAMS,
Attorneys for Defendants in Error.

Filed July 11, 1870. H. E. Mann, clerk. Lampreys, M. Lamprey, att'ys for pl'ffs in error.

6 SCHEDULE.

Circuit court of the United States, for the district of Minnesota.

CHARLES WEIDE AND JOSEPH R. WEIDE
vs.
THE REPUBLIC FIRE INSURANCE COMPANY.

Pleas before the honorable the judges of the circuit court of the United States of America for the district of Minnesota.

DISTRICT OF MINNESOTA, *ss:*

Be it remembered that, on the 21st day of October, in the year of our Lord one thousand eight hundred and sixty-seven, came the said defendant, by Messrs. Lampreys and Brisbin and Warner, its attorneys, and filed in the clerk's office of said court a certain return of the clerk of the district court for the county of Ramsey, and State of Minnesota, and order of removal in the words and figures following, to wit:

STATE OF MINNESOTA, *County of Ramsey:*

District court, second judicial district.

7 CHARLES WEIDE AND JOSEPH R. WEIDE
against
THE REPUBLIC FIRE INSURANCE COMPANY. } Summons.

The State of Minnesota to the above-named defendant, greeting:

You are hereby summoned and required to answer the complaint of

the plaintiff in the above-entitled action, which has been filed with the clerk of this court, at his office, in the court-house in St. Paul, in the county aforesaid, and to serve a copy of your answer to the said complaint upon the subscribers at their office in the city of St. Paul, in the State aforesaid, within twenty days after the service of this summons on you, exclusive of the day of service; and if you fail to answer the said complaint within the time aforesaid, the said plaintiffs will take judgment against you for the sum of two thousand two hundred and fifty dollars with interest thereon from the 25th day of May, A. D. 1867, and the costs of this action.

ALLIS, GILFILLAN & WILLIAMS,
Plaintiffs' Attorneys, St. Paul.

(Endorsed:)

STATE OF MINNESOTA,
County of Ramsey, ss:

8 I hereby certify and return that I have, on the 16th day of July, A. D. 1867, served the within summons on the within-named defendant by delivering personally to Orrin Curtis, managing agent of said defendant, a true and correct copy thereof at St. Paul in my county. Fees $1 40.

D. A. ROBERTSON,
Sheriff of Ramsey County.
By W. G. ROBERTSON, *Deputy.*

4722. District court second judicial district, county of Ramsey. C. Weide & Bro. vs. The Republic Fire Ins. Co. Summons. Allis, Gilfillan & Williams, plaintiffs' attorneys. Filed July 18, 1867. Albert Armstrong, clerk.

STATE OF MINNESOTA,
County of Ramsey:

District court, second judicial district.

CHARLES WEIDE AND JOSEPH R. WEIDE
ag't
THE REPUBLIC FIRE INSURANCE COMPANY.

The plaintiffs, for cause of action against the defendant herein,
9 respectfully shows to the court:

That, during all the times hereinafter mentioned, the plaintiffs were and now are citizens and residents of the State of Minnesota, and during said times were copartners in business as merchants at St. Paul, in said State, under the firm-name and style of "Cha's Weide & Bro."

That, during all of said times, the defendant was, and now is, a corporation duly incorporated and organized as a fire insurance company, under and by virtue of the laws of the State of New York, and was doing and transacting its business of insuring against loss and damage by fire within the State of Minnesota, and under and by virtue and authority of the laws thereof.

That, on the 1st day of February, 1867, at St. Paul aforesaid, in consideration of the sum of twenty-two dollars fifty cents to it then and there paid by the plaintiffs, the defendant did, by its policy of insur-

ance, by it duly executed and delivered to the plaintiffs, insure them in the sum of two thousand two hundred and fifty dollars against loss or damage by fire, for the term of one year from said date, upon their stock of groceries, nails, hollow-ware, and other merchandize contained in the three-story brick building situate on the south side of Third street, between Minnesota and Robert street, Saint Paul, Minnesota.

10 And for the consideration aforesaid the defendant, in and by said policy, did promise and agree to and with plaintiffs, to make good and pay unto them all such immediate loss or damage not exceeding the said sum as should happen by fire to the said property during one year from said day, and to pay the same within sixty days after due notice and proof of said loss made by plaintiffs in accordance with the terms of said policy. That the terms of said policy referred to in said promise were in the following words, that is to say:

"The assured shall forthwith give notice of said loss to the companies, through their general agent, in the city of New York, and as soon after as possible render a particular account of said loss, signed and sworn, to them, stating whether any and what other insurance has been made on the same property; giving copies of the written portion of all policies thereof; the actual cash value of the property; their interest therein; for what purpose and by whom the building insured, or containing the property insured and the several parts thereof were used; when and how the fire originated; and shall also produce a certificate under the hand and seal of a magistrate, notary public, or commissioner of deeds (nearest to the place of the fire, not concerned in the loss

11 as a creditor or otherwise, nor related to the insured) stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount which such magistrate, notary public, or commissioner of deeds shall certify."

And they further say that, after the execution and delivery of said policy, to wit, on the 22d day of February, 1867, the building containing the property insured was burned, and that said property so insured was totally destroyed by fire; that the total cash value of the property so insured and so destroyed was, at the time of such destruction, the sum of seventy thousand six hundred and fifty-four $\frac{85}{100}$ dollars.

And after said destruction the plaintiffs forthwith gave notice of said loss to defendant, through their general agent in the city of New York; and as soon thereafter as possible, to wit, on the 23rd day of March, 1867, they did render to defendant a particular account of said loss, signed and sworn to by them, stating what other insurance had been made on the said property; giving copies of the written portion of all policies thereon; the actual cash value of the property; their interest therein; for what purpose, and by whom the building con-

12 taining the property insured and the several parts thereof were used; when and how the fire originated; and did also then produce and deliver to defendant a certificate under the hand and seal of a notary public nearest to the place of the fire not concerned in the loss as a creditor nor otherwise, nor relative to the plaintiffs, stating that he had examined the circumstances attending the loss; knew the character and circumstances of the plaintiffs, and verily believed that they have, without fraud, sustained loss on the property insured to the amount of seventy thousand six hundred fifty-four $\frac{85}{100}$ dollars.

That, at the time of said loss, plaintiffs were the owners of the said property, and there was insurance thereon to the amount of fifty-two

thousand seven hundred and fifty-two dollars other than that of defendant hereinbefore set forth.

That more than sixty days have elapsed since the giving of notice, rendering of said account, and production of said certificate as aforesaid, but defendant has failed and neglected, and still does fail and neglect to pay them the amount of said loss, or any part thereof, although since the lapse of said sixty days they have demanded the same from defendant.

They therefore demand judgment against defendant for the
13 sum of two thousand two hundred and fifty dollars, with interest from the 25th day of May, 1867, with costs of suit.

ALLIS, GILFILLAN & WILLIAMS,
Pl'ffs' Att'ys, St. Paul, Minn.

STATE OF MINNESOTA,
County of Ramsey, ss:

Joseph R. Weide, being duly sworn, says that he is one of the plaintiffs named in the foregoing complaint, and that the said complaint is true of his own knowledge, except as to matters which are therein stated on his information and belief; as *as* to those matters that he believes it to be true.

JOSEPH R. WEIDE.

Sworn and subscribed before me this 8th day of July, 1867.
[SEAL.] E. D. McCLYMONDS,
Notary Public, Ramsey Co., Minn.

(Endorsed:) No. 4722. District court Ramsey County. Cha's & Jos. Weide vs. The Republic Fire Ins. Co. Complaint. Filed July 9, 1867. Albert Armstrong, clerk. Allis, Gilfillan & Williams, pl'ffs' attorneys.

STATE OF MINNESOTA,
County of Ramsey:

District court second district.

CHARLES WEIDE AND JOSEPH R. WEIDE
against
14 THE REPUBLIC FIRE INSURANCE COMPANY.

And now, the petition of said defendant in this cause for the removal of said cause to the circuit court of the United States for the district of Minnesota for trial having come on to be heard before this court upon such petition, and a bond and security duly approved by this court and filed therein in said cause, and all the papers and proceedings, and the complaint and process in said cause, after hearing Lampreys, attorneys and of counsel for said defendant in favor of said petition. Upon due advisement it is ordered that said petition be, and the same is hereby, granted; and the said cause above entitled is hereby removed from this court into the next circuit court of the United States to be holden in and for the district of Minnesota, according to the act of Congress in such case provided.

By the court.

W. WILKIN,
District Judge.

JULY 29, 1867—11 o'cl'k a. m.

(Endorsed:) 4722. Ramsey County district court. Cha's Weide et al. vs. The Republic Fire Ins. Co. Order.

15 Due service by copy of the within is hereby admitted this July 29, 1867.

ALLIS, GILFILLAN & WILLIAMS,
Pl'ffs' Att'ys.

Filed July 29, 1867. Albert Armstrong, clerk. Lampreys & Brisbin & Warner, def't's att'ys, St. Paul.

STATE OF MINNESOTA,
Ramsey County:

I, Albert Armstrong, clerk of the district court, second judicial district, for county and State aforesaid, do hereby certify that I have compared the foregoing copies with the original summons, complaint, and order granting removal, and the endorsements thereon, on file, and that the same are correct transcripts thereof, and the whole of the same, and that said originals remain of record in my office.

Witness my hand and seal of said court at St. Paul, this 15th day of August, A. D. 1867.

[SEAL.] ALBERT ARMSTRONG, *Clerk.*

[U. S. rev. st., 5 c., cancelled.]

And afterwards, to wit, on the 26th day of December, 1867, came the said defendant by Messrs. Lampreys and J. B. Brisbin, its attorneys, and filed in the clerk's office of said circuit court its answer to said complaint, which is in the words and figures following,
16 to wit:

UNITED STATES CIRCUIT COURT,
District of Minnesota, ss:

CHARLES WEIDE AND JOSEPH R. WEIDE
against
THE REPUBLIC FIRE INSURANCE COMPANY.

The answer of said defendant to the complaint of said plaintiffs in this cause shows to the court and states:

First. The said defendant expressly and specifically denies each and every allegation, statement, matter, and thing, and every part of the same in said complaint contained as therein stated or otherwise, save as hereinafter stated, admitted, or qualified; and said defendant admits that said plaintiffs were citizens and residents of the State of Minnesota, and copartners in business, under the firm-name and style of Cha's Weide & Bro., during the time and as in that behalf stated in said complaint; and said defendant admits that it was, and is, a corporation duly incorporated and organized as a fire insurance company, under and by virtue of the laws of the State of New York, and transacting and doing business of insuring against loss or damage by fire within the State of Minnesota, under and by authority of the laws of said State during the time in said complaint alleged.

17 Second. And further answering herein, said defendant doth admit, aver, and say that, on or about the 1st day of February, 1866, at Saint Paul, in the State of Minnesota, the said defendant, in consideration of the sum of ten dollars to it then and there paid by said

plaintiffs, did, by its certain policy of insurance duly executed and delivered to the plaintiffs, insure them in the sum of one thousand dollars against loss or damage by fire for the term of one year from said day on their stock of groceries, nails, hollow-ware, and other merchandise contained in the three-story brick building mentioned in said complaint, and situated as therein stated, and did agree to make good to the assured, their executors, and assigns, all such immediate loss or damage not exceeding in amount the sum insured by said company as aforesaid as should happen by fire to the said property during one year from said day, to be paid sixty days after due notice and proofs of the same made by the assured, and received at the office of the general agency of the said company in the city of New York, in accordance with the terms of said policy; that said policy provided, and it was covenanted and agreed therein and thereby by said parties among other things, that is
18 to say, "That said company should not be liable for loss by theft at or after a fire;" and that any false representation by the assured of the condition, situation, or occupancy of the property, or any omission to make known every fact material to the risk or an over valuation, or any misrepresentation whatever either in a written application or otherwise should avoid said policy, and then and in every such case said policy should be void, and that in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of said policy, the assured should not be entitled to recover of said company no greater proportion of the loss sustained than the sum thereby insured should bear to the whole amount insured therein, whether such other insurance be by specific or by general or floating policies; that, in case of loss, the assured should forthwith give notice of said loss to the company through their general agent in the city of New York, and as soon after as possible render a particular account of said loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portion of all policies therein, the actual cash value of the property, their interest therein, for what purpose, and by whom the buildings insured, or containing the property insured, and the several parts thereof were
19 used; when and how, the fire originated; and shall also produce a certificate, under the hand and seal of a magistrate, notary public, or commissioner of deeds, (nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to the insured,) stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained the loss on the property insured to the amount which such magistrate, notary public, or commissioner of deeds shall certify; and that the assured should, if required, submit to an examination, under oath, by any person appointed by the company, and, if deemed necessary by the company, to a second examination, and subscribe to such examinations when reduced to writing; and shall also produce their books of account and other vouchers, and all property hereby insured, whether damaged or not damaged, and shall also produce certified copies of all bills and invoices, the originals of which have been lost, and exhibit the same for examination to any person named by the company. And until such proofs, declarations, and certificates are produced, and examinations and appraisals permitted, the loss shall not be payable; all fraud or attempt at fraud, or false
20 swearing on the part of the assured, shall cause a forfeiture of all claims under this policy; and that if reinsurance should be thereby made for any other insurance company, to be on a basis of such a

liability, that, in the event of loss, this said company should pay only its proportion of said loss pro rata with said other company as the amount reinsured should bear to the whole amount insured by such other company; and that said policy was made and accepted by said parties upon the express terms and conditions aforesaid and herein stated. And that said policy was renewed and continued in force by said company on or about the 1st day of February, 1867, for one year, and until the 1st day of February, 1868, in consideration of the premiums duly paid to it by said plaintiffs therefor, and by indorsement on said policy on or about January 31st, 1867, in consideration of the cash premium to it paid by plaintiffs therefor, the additional sum of one thousand and two hundred and fifty dollars was insured upon said stock described in said policy by said company upon the same terms and conditions as therein stated. And that, after the execution and delivering of said policy of insurance,
21 to wit, on or about the 22d day of February, 1867, the said building was mostly burned, but as to whether said property or any of the same so insured was totally or partially, or to what extent the same, or any of the same, was destroyed by fire, then or there or at any time or place, said defendant has not any knowledge or information thereof sufficient to form a belief; but said defendant expressly denies that the actual cash value, or the value of such property at the time of, or at or about the time of such fire or alleged loss was seventy thousand six hundred and fifty-four $\frac{85}{100}$ dollars, or any greater sum than twenty thousand dollars in all.

And further answering, said defendant admits, avers, and says herein that, on or about the 19th day of March, 1867, said plaintiffs gave notice thereof to said defendant, and rendered to it an account of their loss, under oath, stating the time of the fire, occupancy of the building aforesaid at the time of the fire, and what other insurance was on said property, copies of other policies of insurance thereof, what they pretended to be the whole value of the property, and the amount of loss or damage thereto; and did produce and deliver to it the certificate, under oath, of
22 a notary public mentioned in said complaint, containing the statements therein mentioned; but said defendant denies that said notice or proofs were at any time or place satisfactory to said company, or true or correct; that said defendant has not any knowledge or information thereof sufficient to form a belief as to whether or not said plaintiffs were at the time of said fire, or at any time, the owners of the said property, or any, or what part, if any, of the same. And said defendant admits, avers, and says that the whole sum insured upon said property was, and the said plaintiffs were insured thereon at the time of said fire and alleged loss in the further and additional sum of $52,350 over and above that of the said defendant's above stated; and that more than sixty days have elapsed since the alleged service of said notice and proofs, and that payment thereof has been demanded of said defendant, and that the same has not been paid.

Third. And further answering in this case, and for a further defence therein, said defendant charges the facts to be, alleges and avers that heretofore, to wit, on or about March 19, 1867, and on or about March 30, 1867, and on or about April 3, 1867, and at different times subsequent to the date of said fire and alleged loss, and prior to the date of the commencement of this action, at Saint Paul, said plaintiffs,
23 and each of them upon his oath, and where not upon oath, wilfully, falsely, and fraudulently, and with intent to cheat and defraud said defendant, stated and represented to said company, this defendant, and to the Hartford Insurance Company and its agents, as fol-

lows, to wit: that the amount and value of the property aforesaid belonging to them, the said plaintiffs, and so insured as aforesaid, and which was totally destroyed by said fire, the sum of $70,654 85 at the time of said fire, when in fact the same was not more than $20,000; that the amount of their goods on hand Feb. 28, 1865, as the primary basis of their claim against said defendant thereon, was $47,561 87, when in truth the same was only $25,400 87, then and there; that two of the companies which had insurance upon said property at the time of said fire, the Phœnix and City Fire Insurance companies, the former having had a policy of $5,000, and the latter a policy of $3,000 upon said property, then and there had paid the full amount of their policies to said plaintiffs with a slight discount, when in fact both of said companies had been allowed a discount of 46 per cent. upon the policies by said plaintiffs; and further, that said plaintiffs had represented no other or different basis for settlement to any of the companies interested in their
24 loss by said fire than that stated to said Hartford as above mentioned, when in truth said plaintiffs had at that time represented and given to the Phœnix, City Fire, Ætna, and Underwriters' Insurance companies, seven of said companies, and each of them, a basis of settlement more than $40,000 below that represented and stated by said plaintiffs to this said Hartford Company as aforesaid; and further, that said plaintiffs greatly overstated the amount of goods purchased by them during the year 1866, and during the year preceding the fire; and further, the said plaintiffs greatly understated the amount of the sales during the year 1866, and the year preceding the fire, and stated and represented to said defendant and said companies that they had on hand in said building at the time of the fire aforesaid, divers and sundry goods of which they had none on hand whatever then or there; and said plaintiffs have wilfully and greatly misrepresented the facts respecting such fire and loss required by said policy to be stated by them. And the said defendant avers that said plaintiffs and each of them have and did wholly refuse to answer questions relating to the said loss propounded to them by the agents of said company, and this defend-
25 ant as required by the terms and conditions of said policy as above stated, and about the last of March or first of April, 1867; and that said plaintiffs have so made such statements and representations and done such acts and things as aforesaid knowing the same to be false and fraudulent and with intent to defraud said defendant as aforesaid, and that thereby and by reason thereof all claims under said policy *is* forfeited and made null and void by the terms thereof; of all which facts above stated said plaintiffs had full notice and knowledge.

Said defendant therefore denies that it is indebted to said plaintiffs or either of them in any sum or for any cause.

Wherefore said defendant demands judgment against said plaintiffs herein, that said plaintiffs take nothing by their action and that said policy be ordered to be given up and cancelled, and for the costs and disbursements of this action.

LAMPREYS & J. B. BRISBIN,
Defendant's Attorneys, St. Paul, Minn.

STATE OF MINNESOTA,
County of Ramsey, ss:

O. Curtis came before me personally and being duly sworn doth
26 say that he is the agent of and an officer of said defendant, which is a corporation, in the above-entitled action; that the foregoing answer is true of his own knowledge, except as to the matters which are

therein stated on his information or belief, and as to those matters that he believes it to be true.

O. CURTIS.

Subscribed and sworn to before me on this 26th day of Dec., A. D 1867.

J. N. CARDOZO,
U. S. Commissioner Dist. Minn.

And afterwards at a stated term of said court begun and held at the city of Saint Paul, in said district, on the 3d Monday, (being the 20th day) of June, A. D. 1870, on the first day of said term the following proceeding, among others, was had, to wit :

CHARLES WEIDE ET AL.
vs.
THE GERMANIA INS. CO.

CHARLES WEIDE ET AL.
vs.
THE HANOVER FIRE INS. CO.

CHARLES WEIDE ET AL.
vs.
THE NIAGARA FIRE INS CO.

27 CHARLES WEIDE ET AL.
vs.
THE REPUBLIC FIRE INS. CO.

Ordered that these four cases be tried together before the same jury, separate verdicts being rendered in each case, the attorneys for the respective parties in such suits being present and consenting thereto in open court.

And afterwards, on the fourth day of said term, the following proceedings, among others, were had, to wit:

CHARLES WEIDE, ET AL.
vs.
THE GERMANIA FIRE INS. CO.

CHARLES WEIDE ET AL.
vs.
THE HANOVER FIRE INS. CO.

CHARLES WEIDE ET AL.
vs.
THE NIAGARA FIRE INS. CO.

CHARLES WEIDE ET AL.
vs.
THE REPUBLIC FIRE INS. CO.

28 These causes coming on to be heard, the several parties appeared by their respective attorneys, and a jury being called to

try the issues therein came, to wit, Jeremiah Russell, J. A. Ellison, J. C. George, Thomas Frost, T. J. Lake, S. J. Johnson, D. Wallen, John Thompson, John O'Gorman, T. M. Newson, Charles Judson, and John Little, who are duly empannelled and sworn to try the issues in said cases and true verdicts give according to the evidence.

The case is opened on the part of the plaintiffs by James Gilfillan, their attorney.

JOSEPH WEIDE is sworn and examined as a witness for the plaintiffs.

And afterwards, on the fifth day of said term, the following proceedings, among others, were had to wit:

CHARLES WEIDE ET AL.
vs.
THE GERMANIA FIRE INS. CO.

CHARLES WEIDE ET AL.
vs.
THE HANOVER FIRE INS. CO.

CHARLES WEIDE ET AL.
29 *vs.*
THE REPUBLIC FIRE INS. CO.

These causes coming on to be further heard, and the jury heretofore empanelled and sworn herein being called, came. Charles Weide, H. L. Williams, Louis Kreiger, and William Petters, are sworn and examined as witnesses for the plaintiffs.

And here the plaintiffs rest their cases.

Cases opened on the part of defendant by Morris Lamprey, their attorney.

Durand, S. S. Eaton, and Theodore Bomp are sworn and examined as witnesses for defendant.

And afterwards on the sixth day of said term the following proceedings, among others, were had, to wit:

CHARLES WEIDE ET AL.
vs.
THE GERMANIA FIRE INS. CO.
AND
THE HANOVER FIRE INS. CO.
AND
THE NIAGARA FIRE INS. CO.
AND
THE REPUBLIC FIRE INS. CO.

These causes coming on to be further heard, and the jury here-
30 tofore empanelled being called, came—

Bartlett Presley, P. Kelley, P. F. McQuillan, J. M. Bohrer, Thomas Howard, John Turner, J. W. McClung, and John Holland are sworn and examined as witnesses for the defendants.

And here the defendants rest their cases.

Joseph Weide and Charles Weide recalled and examined as witnesses for the plaintiffs.

And here the respective parties, plaintiffs and defendants, rest.

And afterwards, on the seventh day of said term, the following proceedings, among others, were had, to wit:

CHARLES WEIDE ET AL.
vs.
THE GERMANIA FIRE INS. CO.
AND
THE HANOVER FIRE INS. CO.
AND
THE NIAGARA FIRE INS. CO.
AND
THE REPUBLIC FIRE INS. CO.

These causes coming on to be further heard, the several parties, by their respective attorneys, appear, and the jury heretofore empanneled and sworn to try the issues therein, being called, came.

Mr. Storrs sums up for the defendants.

Lorenzo Allis, esq., sums up for the plaintiffs.

31 Charge is given the jury by the court, and they retire in charge of an officer duly sworn and qualified to attend them.

And afterwards, on the eighth day of said term, the following proceedings, among others, were had, to wit:

CHARLES WEIDE ET AL.
vs.
THE REPUBLIC FIRE INS. CO.

And now the jury heretofore empanelled and sworn to try the issues in the above-entitled cause, being returned into court, present to the court their verdict in writing; which is in the words and figures following, to wit:

We, the jury empanelled to try the case of Charles Weide et al. vs. The Republic Fire Insurance Company, render the following verdict: For the plaintiffs in the sum of two thousand two hundred and fifty dollars, with interest, at the rate of seven per cent., from the 19th day of May, 1867, to June 28th, 1870, four hundred and ninety dollars and thirty-four cents—total, two thousand seven hundred and forty dollars and thirty-four cents, (2,744 34.)

THOMAS M. NEWSON, *Foreman.*

32 Whereupon the defendant, by its attorneys, made a motion for a new trial, which was, after argument, submitted to the court, and by the court denied.

And afterwards, and on the twelfth day of said term, the following proceeding, among others, was had, to wit:

CHARLES WEIDE ET AL.
vs.
THE REPUBLIC FIRE INS. CO.

And now come the plaintiffs, by Messrs. Allis, Gilfillan & Williams, their attorneys, and move the court that judgment be rendered upon the verdict of the jury heretofore found and rendered by the jury empanelled to try the issues joined in this cause.

Whereupon it is by the court ordered and adjudged that the plaintiffs do have and recover of and from the defendant the sum of two thousand seven hundred and forty dollars and thirty-four cents, (being the amount of the verdict of the jury heretofore found and returned herein in favor of the plaintiffs,) besides the costs and disbursements of the plaintiffs by them in and about this suit in this behalf expended, to be taxed, and that the plaintiffs have execution therefor.

33 And afterwards, to wit, on the 2d day of July, A. D. 1870, the said defendant, by its said attorneys, filed in the clerk's office of said court its bill of exceptions, duly allowed, signed, and sealed, in the words and figures following, to wit:

Bill of exceptions.

Circuit court of the United States of America for the district of Minnesota.

CHARLES WEIDE AND JOSEPH R. WEIDE
vs.
THE REPUBLIC FIRE INSURANCE COMPANY.

Be it remembered that on the trial of this cause, which came on for trial before this court, at the general term thereof, on the 23d day of June, A. D. 1870, the honorable the judges, Samuel F. Miller and John F. Dillon, presiding, a jury was duly empanelled and sworn to try this cause.

And to maintain the issues on their part, the plaintiffs introduced evidence tending to show that at the fire mentioned in their complaint all the books and papers of the plaintiffs were destroyed, except one ledger, commencing Oct. 1, 1866, and continued to Feb. 22, 1867, the time of the fire, and two day-books, commencing May 31, 1865, and continuing to Feb. 22, 1867; that said day-books contained the original entries of the purchases and of the sales of merchandise made by
34 plaintiffs during the period covered by said day-books; that during said period plaintiffs kept no clerk; that such entries were made by one or the other of the plaintiffs at the time of the transaction so entered, and each of the plaintiffs testified that such entries made by him were truly and correctly made; that one of the plaintiffs, upon being sworn as a witness for plaintiffs on the trial, could state from his recollection the amount and value of their stock on hand at the time of, and destroyed by, the fire; and the other plaintiff, upon being so sworn, could not state the amount or value thereof from his recollection, and neither of the plaintiffs could state from his recollection the amount or value of their stock when they took their last inventory, to wit, on the 28th of Feb., 1866, nor the amount of their sales or purchases of merchandise from the taking of such inventory to the time of the fire; that the entries in said ledger were made by one or the other of said plaintiffs, and each of them testified that such entries made by him were correctly made, and consisted of postages from said day-books, and at the time of the transaction referred to in such entries, except the first entry in said ledger on the debit side of the merchandize account therein, concerning which item plaintiffs introduced evidence tending to show that it was an item correctly transferred by one of the plaintiffs
35 from an exhausted ledger destroyed by the fire to the present ledger, and that the item so transferred was the balance on the

debit side of the merchandise account in said exhausted ledger; that the entries in said exhausted ledger were correctly made by one or the other of the plaintiffs at the time of the transaction so entered, and that the postings and balances therein were correct, each of the plaintiffs testifying that such entries, footings, and balances made and footed by him were correctly made and footed.

And further to maintain the issues on their part, plaintiffs introduced evidence tending to show that they took an inventory of their stock on the 28th day of Feb'y, 1866; that said inventory was correctly taken, and at the same time correctly reduced to writing by one or the other of the plaintiffs in the inventory-book kept by them for such purpose; that the prices or values therein were correctly stated and correctly footed up in said book at the time, and that at the same time one of the plaintiffs correctly entered said footings and other footings upon the fly-leaf of said exhausted ledger, and afterwards one of said plaintiffs correctly transferred such footings to the fly-leaf of the present ledger on or after Oct. 1st, 1866; that neither of plaintiffs could state from
36 his recollection the amount of such inventory or of such footings.

And further to maintain the issues on their part the plaintiffs thereupon offered in evidence the said entry upon the said fly-leaf of said ledger, which is in the words and figures following, to wit:

"1866, Feb. 21st.

"Merchandise		$74,520 74
		"39,169 64
		"900 00
		"396 60
		"$114,986 98
"Liabilities		56,656 29
		"58,330 69"

Whereupon the defendant objected to the said memorandum of said fly-leaf, upon the grounds that the same had not been properly verified; that no foundation had been laid for introducing the same, or any part of the same, because the same, and every part of the same, were declarations of parties in their own favor, and incompetent and immaterial.

The court overruled each of the objections and received the same in evidence, to which ruling of the court the defendant then duly excepted, and, by request of the defendant, its exceptions were duly noted and allowed by the court at the time.

And further to maintain the issues on their part, the plaintiffs therefor offered in evidence the said first item on the debit side in their
37 present ledger of said merchandise account therein; which first item of said merchandise account was as follows, to wit:

"Merchandise ac., page 63:

"1866, Oct. 1st. To am't forward || 36 || 77,538 16."

To which the defendant then and there objected, upon the grounds that there was no foundation laid for introducing the same, or any part of the same, because the same had not been duly verified, and because the same, and every part of the same, were declarations of a party in his own favor, and incompetent and immaterial.

The court overruled each of the objections and received the same in evidence. The defendant then duly excepted to said ruling of the court,

and, by request of the defendant, its exceptions were duly allowed and noted by the court at the time.

The recited facts in the memorandum of evidence bearing on the subject being as hereinbefore stated, the plaintiffs offered in evidence the said merchandise account in said ledger contained.

Whereupon the defendant objected to the introduction of the same in evidence, upon the grounds that the same had not been duly verified; that no foundation had been laid for introducing the same, because the same, and every part of the same, were statements of a party in
38 his own favor, and incompetent and immaterial; that the court overruled the defendant's objections and received the same in evidence; to which ruling of the court the defendant then and there excepted, and, by request of the defendant, its exception thereto was duly allowed and noted by the court at the time.

There being evidence tending to show that the real loss of plaintiffs was far less than the total amount of insurance made by the defendant, and certain other insurance companies having insurance on the plaintiffs' stock of merchandise; and also that plaintiffs had made certain settlements at the rate of fifty-four cents on a dollar with certain of said other insurance companies having such insurance on said stock; and that on an examination of plaintiffs before this action was commenced, under oath required by defendant of plaintiffs, under the conditions of said policy, the plaintiffs disclosed the fact that they have made such settlements with such other companies having insurance on said stock, but on such examination refused to answer questions put to them by defendant as to the amount for which they made such settlements; and it appearing by the policy that the following conditions were contained therein, to wit:

39 "In case of loss the assured shall use their best endeavors in saving and protecting the property from damage at and after the fire. If they shall fail so to do the companies will not be liable for damage caused by such failures, and there can be no abandonment to the companies of the property insured. The assured shall forthwith give notice of said loss to the companies through their general agent in the city of New York, and as soon after as possible render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portion of all policies thereon, the actual cash value of the property, their interest therein, for what purpose and by whom the *liability* insured, or containing the property insured, and the several parts thereof, were used; when and how the fire originated; and shall also produce a certificate, under the hand and seal of a magistrate, notary public, or commissioner of deeds, nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to the assured, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and
40 verily believes that the assured has, without fraud, sustained loss on the property insured, to the amount which such magistrate, notary public, or commissioner of deeds shall certify; and the assured shall, if required, submit to an examination under oath, by any person appointed by the companies, and, if deemed necessary by the companies, to a second examination, and subscribe to such examination when reduced to writing; and shall also produce their books of account and other vouchers, and all property hereby insured, whether damaged or not damaged; and shall also produce certified copies of all bills and invoices, the originals of which have been lost, and exhibit the same for

examination to any person named by the company. Damages to property not totally destroyed shall be appraised by disinterested men mutually chosen by the assured and the companies; and the companies preserve the right to take the articles damaged at their appraised value. When personal property is damaged the assured shall forthwith cause it to be put in the best order possible, properly arranged, and make an inventory thereof, naming the quantity and cost of each article, and upon each article the damage shall be separately appraised, and the detailed report of the appraisers, in writing, shall form a part of the proofs
41 hereby required; one-half of the appraisers' fees to be paid by the companies. In case of loss on property held in trust or commission, or if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth, with their respective interests therein certified to by them. If this policy is made payable in case of loss to a third party, or held as collateral security, the proofs of loss shall be made by the party originally insured, unless there has been an actual sale of the property insured. And until such proofs, declarations, and certificates are produced, and examinations and appraisals permitted, the loss shall not be payable. All fraud, or attempt at fraud, or false swearing on the part of the assured shall cause a forfeiture of all claim under this policy."

The defendant moved the court, before the jury had retired, to instruct the jury as follows, that is to say:

"If the jury shall believe that plaintiffs, or either of them, in the course of an examination on oath, under the policy, refused to answer any questions by which defendant could fairly estimate or reasonably infer plaintiffs' real loss in the insured property, and have not
42 before the announcement of this action answered said questions under oath, then the jury must find for the defendant."

Which motion or request the court wholly refused to give in substance or effect; to which ruling of the court and refusal to charge, the defendant then and there duly excepted, and by request of defendant its exception thereto was duly allowed and noted by the court at the time.

There being evidence tending to show that the plaintiffs were requested to produce duplicate bills of purchases, the facts in evidence, so far as applicable, being as recited in the statement made in the above fourth exception of the defendant, the defendant before the jury had retired, moved the court to instruct the jury as follows, to wit:

"If the jury believe from the evidence, that the plaintiffs were requested by the defendant to produce duplicates of invoices of goods purchased by them, the originals of which were alleged by them to be destroyed, and neglected so to do before the commencement of this action, their right of action never accrued and the jury must find for the defendant."

Which motion or request the court wholly refused to give in substance or effect; to which ruling of the court and refusal to charge, the defendant then and there duly excepted, and by request of defendant its exception thereto was duly allowed and noted by the court at the time.

43 The testimony of the plaintiffs given in evidence before the jury tending to show material discrepancy from material statements made by them in their proofs of loss and their examination on oath under the policy, the requirements of the policy being as hereinbefore set forth in the recital of facts made in the memorandum at-

tached to the fourth exception, the defendant moved the court to instruct the jury as follows, to wit:

"If the jury shall believe that the plaintiffs testifying on this trial have made statements materially differing from statements knowingly made under oath in their proofs of loss, whether in their particular account made to the defendant, or any examination on oath submitted to by them, under the terms of the policy, this is false swearing, and the jury must find for the defendant."

Which motion or request the court wholly refused to give in substance or effect; to which ruling of the court and refusal to charge, the defendant then and there duly excepted and by request of the defendant its exception was duly allowed and noted by the court at the time.

In the examination on oath made by the plaintiffs under the
44 policy, the condition of the policy being as set fourth in the recital of facts accompanying the above fourth exception, the plaintiffs having stated the outstanding debts of the plaintiffs to be between eighteen thousand dollars and twenty thousand dollars, at the time of the fire, and the plaintiffs having stated in evidence before the jury that their indebtedness did not exceed eight thousand dollars at the time of the fire, and there being evidence tending to show that plaintiffs knowingly made the statements in said examination on oath, and subscribed and made oath to the same, the defendant moved the court to instruct the jury before they retired as follows, to wit:

"In their examination under this policy, plaintiffs seem to have sworn that the outstanding debts of their firm amounted to between eighteen thousand dollars and twenty thousand dollars, at the time of the fire. In their testimony here they state positively that their indebtedness did not exceed eight thousand dollars at that time; if the jury shall believe that they knowingly made the statement set forth in their examination on oath and subscribed and made oath to the same, the jury must find for the defendant."

Which motion or request the court wholly refused to give in
45 substance or effect; to which ruling and refusal of the court, the defendant then and there duly excepted, and by request of the defendant, its exception thereto was duly allowed and noted by the court at the time.

And the defendant having put in evidence the entry on said fly-leaf for the year 1865, to show what said fly-leaf stated the plaintiffs' merchandise to be the last of Feb., 1865, when the plaintiffs claim to have taken an inventory thereof, of which plaintiffs testified the said entry on said fly-leaf for the year 1865 showed the footings, and the said entry on said fly-leaf for the year 1865, being in the words and figures following, to wit:

"1865.	
"Merchandise	$47,561 87
"Book accounts, notes, & cash	30,927 62
"Real estate	900 00
"Store fixtures	396 00
	"79,786 09
"Liabilities	27,140 51
	"$52,645 58"

And the plaintiffs having testified that the profits on their sales for the year ending Feb. 28, 1866, was nine per cent.; the defendant
46 moved the court to instruct the jury before they retired as follows, to wit:

"It is for the jury to determine from all the facts and circumstances in the case whether the plaintiffs had on hand, on the 28th day of Feb'y, 1866, goods to the amount of $74,520, as shown by the fly-leaf of their ledger. In ascertaining the correctness of that entry on the fly-leaf, it is proper for the jury to take into the account, as a basis for their calculations the amount of merchandise shown by the fly-leaf, and claimed by the plaintiffs to have been on hand on the 1st day of March, 1865, to such amount should be added the purchases made during the year, and from this sum should be subtracted the sales, less the profits. If the jury believe, from the evidence in the case, that, on the 1st day of March, 1865, the plaintiffs had on hand, as shown by the fly-leaf, the sum of $47,561 87; that their purchases did not exceed the sum of $135,000 for the year ending Feb. 28, 1866; that the sales during the same period of time were $152,000, and that the profits on the sales were nine per cent. the incorrectness of the entry upon the fly-leaf would be thereby established, and the plaintiffs could have had on hand, on the 28th day of Feb., 1866, no larger amount of merchandise
47 than would be shown by deducting the amount of sales $152,000, less the profits, at nine per cent., from the total of merchandise on hand March 1, 1866, and the purchases during the year."

Which motion or request the court wholly refused to give in substance or effect; to which ruling and refusal of the court to charge, the defendant then and there duly excepted, and by request of the defendant, the exception thereto was duly allowed and noted by the court at the time.

And the defendant thereupon moved the court, before the jury had retired, to instruct the jury as follows, that is to say:

"In ascertaining the amount of merchandise which the plaintiffs had on hand at the time of the fire, it is proper for the jury to take, as the basis of their calculations, the amount actually on hand on the 28th day of Feb'y, 1866. In determining what that amount actually was the jury are not bound by the fly-leaf of the ledger; but if the jury believe from calculations made by them, based upon the stock on hand March 1, 1865, and the purchases, sales, and profits upon sales made
48 during the year following, that the goods on hand, March 1, 1866, amounted to only about $40,000 *dollars*, then the jury should take such sum as the basis of their calculations, and arrive at a conclusion of the merchandise on hand at the time of the fire, by the same process adopted in ascertaining the amount of merchandise March 1, 1866."

Which motion or request the court wholly refused to give in substance or effect; to which ruling of the court and refusal to charge, the defendant then and there duly excepted, and by request of the defendant its exception was duly allowed and noted by the court at the time.

And now the counsel for the defendant having duly excepted to the rulings of the court above stated, and prayed that his bill of exceptions be allowed, and the same having been examined and found to be true, at the request of the counsel for the defendant, the counsel for the plaintiff appearing and present, the foregoing bill of exceptions is hereby allowed, signed, and sealed.

SAM. F. MILLER, *Judge.* [SEAL.]

49 And afterwards, to wit, on the eleventh day of July, A. D. 1870, on application of said defendant, by Messrs. Lampreys and John B. Brisbin, its attorneys, to the Honorable Rensselaer R. Nelson, one of the judges of said court, at his chambers in the city of St. Paul, in said district, an allowance of a writ of error was made, in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT,
District of Minnesota, ss:

CHARLES WEIDE AND JOSEPH R. WEIDE
agst.
THE REPUBLIC FIRE INSURANCE COMPANY.

And now, upon filing the security approved by me in this cause, upon application of the defendant, the writ of error to the Supreme Court, therein, is allowed.

July 11, A. D. 1870.

R. R. NELSON,
U. S. Dist. Judge.

50 UNITED STATES OF AMERICA,
Circuit Court of the United States, District of Minnesota, ss:

I, H. E. Mann, clerk of said circuit court, do hereby certify and return to the honorable the Supreme Court of the United States, that the foregoing is a full, true, and complete transcript of the records, process, pleadings, orders, final judgment, and all other proceedings in said cause; and also of the bill of exceptions filed therein, as appears from the original files and records of said court; and I do further certify and return that I have annexed to said transcript, and do hereby transmit therewith the original citation, together with the proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of the said court, at Saint Paul, in the district aforesaid, this 11th day of November, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the ninety-fifth year.

[SEAL.]

H. E. MANN,
Clerk U. S. Circuit Court, District of Minnesota.

(Indorsed:) Charles Weide et al. vs. The Republic Fire Ins. Co. Return to writ of error.

(Indorsement on cover:) No. 373. The Republic Fire Insurance Company, plaintiff in error, vs. Charles & Joseph R. Weide. Minnesota, C. C. U. S. Filed 10th December, 1870.